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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellant,	:	
v.	:	
LARRY DEAN COLEMAN,	:	Case No. 20000626-CA Priority No. 15
Defendant/Appellee.	:	

BRIEF OF APPELLEE

Appeal from an order dismissing the Information charging Larry Dean Coleman with the operation of a clandestine laboratory, a second degree felony in violation of Utah Code Ann. § 58-37d-4(1)(a) and/or (b)(1998); possession of a controlled substance with intent to distribute, a second degree felony in violation of Utah Code Ann. § 58-37-8(1)(a)(iii)(1998); and possession of drug paraphernalia, a class B misdemeanor in violation of Utah Code Ann. § 58-37a-5(1998).

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NATURE OF THE PROCEEDINGS AND JURISDICTION

The State appeals from the trial court's final order[1] dismissing the Information charging Larry Dean Coleman ["Mr. Coleman"] with the operation of a clandestine laboratory, a second degree felony in violation of Utah Code Ann. § 58-37d-4(1)(a) and/or (b)(1998);[2] possession of a controlled substance with intent to distribute, a second degree felony in violation of Utah Code Ann. § 58-37-8(1)(a)(iii)(1998);[3] and possession of

[1] A copy of the trial court's "Order of Dismissal," R. 95, is attached as Addendum A.

[2] Notice was given in the Information that Mr. Coleman was subject to the enhanced penalty of a first degree felony pursuant to Utah Code Ann. § 58-37d-5(1)(d), (f), and/or (g) because "the intended laboratory operation was to, or did, take place within 500 feet of a residence, place of business, church, or school; and/or the clandestine laboratory operation actually produced an amount of a specified controlled substance, to-wit: Methamphetamine, and/or the intended laboratory operation was for the production of Methamphetamine base." R. 3.

[3] Although this statute was amended affective 1 May 2000, the Information was issued prior to that on 19 October 1999.

drug paraphernalia, a class B misdemeanor in violation of Utah Code Ann. § 58-37a-5(1998).

This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(j)(1996).

STATEMENT OF THE ISSUE AND STANDARD OF REVIEW

Issue: Did the trial court correctly determine that the prosecution failed in its affirmative duty to bring Mr. Coleman to trial within 120 days after he delivered proper written notice of his demand for disposition of pending charges?

Standard of Review: This issue is subject to a bifurcated review. Insofar as it relates to matters of statutory interpretation, this court reviews for correctness, "according no particular deference to the trial court's interpretation." State v. Lindsay, 2000 UT App 379, ¶4, 411 Utah Adv. Rep. 41. With regard to the trial court's factual findings, such as determinations of whether a delay was attributable to the defendant, this court applies "a clearly erroneous standard." State v. Phathammavong, 860 P.2d 1001, 1004 (Utah Ct. App. 1993).

Therefore we cite to the former version of the statute. See State v. Redd, 1999 UT 108, ¶4 n.2, 992 P.2d 986 ("[W]e apply the law as it existed at the time of the crime charged.")

RELEVANT STATUTORY PROVISION

The following statute is determinative of the issue on appeal:

Prisoner's Demand for Disposition, Utah Code Ann. § 77-29-1(1999)

The full text of this statute is provided in Addendum B.

STATEMENT OF THE CASE

The chronology of proceedings in this case is as follows:

28 September 1999	Mr. Coleman is arrested after police discover marijuana, methamphetamine, and material often used to make and package drugs in a motel room where he is staying. R. 286 [32-36].
19 October 1999	An Information is issued charging Mr. Coleman with one count of operating a clandestine laboratory, one count of possession of drugs with the intent to distribute, and one count of possession of drug paraphernalia. R. 3-6.
28 October 1999	Mr. Coleman executes a "Notice and Request for Disposition of Pending Charges," R. 42, and an "Office Memorandum" on the subject of "120 Day Dispositions." R. 45.
29 October 1999	Defense counsel makes a formal request for discovery. R. 12-13.
2 November 1999	Roll call is held, and a preliminary hearing is scheduled

	for November 30th. R. 285 [2].
15 November 1999	Utah State Prison stamps the "Notice and Request for Disposition of Pending Charges" as "Received." R. 42, 289 [32].
30 November 1999	In proceedings before the court, a conflict of interest is noted by the Salt Lake Legal Defender Association, which was representing both Mr. Coleman and his co-defendant, Ms. Coleman. Another roll call is scheduled. R. 283 [3-4].
6 December 1999	Utah State Prison authorized agent acknowledges receipt of the "Notice and Request for Disposition of Pending Charges." R. 42. Prosecutor's office receives the Notice. R. 289 [11].
21 December 1999	Upon stipulation of counsel, and to allow time to conflict Ms. Coleman's case out of the Salt Lake Legal Defender's office, the preliminary hearing is set for January 20th. R. 18-20.
20 January 2000	The first part of the preliminary hearing is held. It is continued until February 24th at 9 p.m. R. 286 [6-7, 71].
24 February 2000	The second part of the preliminary hearing is held, and Mr. Coleman is bound over. R. 287 [80].
20 March 2000	Mr. Coleman is arraigned and pleads not guilty. R. 282 [3-5]. Defense counsel informs the court of its intention to file a

	motion to dismiss on the basis of the 120-day disposition, and a motion to suppress. Defense counsel also requests a trial date. R. 282 [5]. The hearing date for the motions is set for May 15th. R. 282 [8].
24 March 2000	Defense counsel's "Memorandum in Support of Defendants Motion to Dismiss" is filed. R. 39.
27 March 2000	Defense counsel's "Motion to Suppress" and supporting memorandum is filed. R. 48, R. 50.
15 May 2000	Hearing is held on the motions to dismiss and suppress. The trial court finds there are only six days remaining in the 120-day period which the prosecutor had to bring Mr. Coleman to trial. R. 289 [33].
23 May 2000	Trial court dismisses the case on the grounds that the prosecution failed to bring Mr. Coleman to trial within 120 days after receiving notice of disposition. R. 95.

The State filed timely Notice of Appeal in the Utah Supreme Court. R. 97. Mr. Coleman filed a Motion to Dismiss for lack of jurisdiction,[4] and the Utah Supreme Court transferred the case to this Court pursuant to Rule 44 of the Utah Rules of Appellate

[4] The Motion to Dismiss and supporting memorandum are provided in Addendum C.

Procedure.[5]

STATEMENT OF THE FACTS

On 28 September 1999 three police officers arrived at room 310 at a Quality Inn in Sandy with a warrant for the arrest of Jamie Coleman ["Ms. Coleman"]. R. 286 [11-12], R. 287 [55-56]. They knocked on the door and Ms. Coleman eventually emerged, closing the door behind her. R. 287 [56]. A female officer, Carrie Geer ["Officer Geer"], informed her that she was under arrest. R. 287 [57]. Ms. Coleman, who wore only a shirt, said she wanted to get dressed. R. 287 [57-58]. Officer Geer assented and accompanied her into the motel room. Id. The other two officers stood in the doorway. R. 286 [16].

Inside the room, Officer Geer saw a "fog at the top of the room," and she had a hard time breathing. R. 287 [59]. She also saw a package that looked like it contained marijuana. Id. Without advising Ms. Coleman of her Miranda rights, Officer Geer asked her about the package, and Ms. Coleman replied that it was marijuana. Id. Officer Geer also saw material often used to package drugs, and ingredients and equipment often used to make drugs. R. 287 [60]. She also smelled methamphetamine. R. 287

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[5] The order is provided in Addendum D.

[71]. She relayed this information to the other officers. R. 287 [61-62].

From the doorway, the officers noticed a man, later identified as Mr. Coleman, in the room. R. 286 [18]. One of the officers began asking Mr. Coleman questions, and Mr. Coleman requested an attorney. R. 286 [18-19]. The police placed him under arrest. R. 286 [20]. Soon after, Ms. Coleman gave handwritten permission for police to search the room. R. 286 [23]. The police made a "brief" search of the room. Id. Police eventually seized a number of items as evidence. R. 286 [32-34].

SUMMARY OF THE ARGUMENTS

The trial court's dismissal of this case for failure to bring Mr. Coleman to trial within 120 days after he filed notice and demand for 120-day disposition should be affirmed. More than 208 days had passed since Mr. Coleman executed the appropriate documents, and the trial court made factual findings that most periods of delay in this case were not attributable to Mr. Coleman.

The State argues that three periods of time were attributable to Mr. Coleman, and that the 120-day period should have been tolled during these periods. The State is correct with regard to one three-day period between 27 March 2000 and 30 March

2000, but failed to marshal the evidence to show that the trial court was incorrect in its findings that the 14-day period between 16 November 1999 and 30 November 1999 and the 23-day period between 1 February 2000 and 24 February 2000 were not attributable to Mr. Coleman.

The record supports the trial court's findings with regard to these two periods of delay. The transcript from the November 2nd roll call and the discovery request documents indicate that the 14-day delay between 16 November 1999 and 30 November 1999 was due to difficulties with obtaining discovery. Additionally, the State's argument that the delay is attributable to Mr. Coleman because he refrained from waiving his right to a preliminary hearing is insupportable. Preliminary hearings are a constitutionally-established component of bringing a criminal defendant to trial, are normally expected, and do not surprise the prosecution with unnecessary delays.

Additionally, 18 days should be added to this 14-day delay. The 120-day period commenced when Mr. Coleman executed paperwork on October 28th, and the trial court incorrectly gave the benefit of the period between October 28th and November 15th to the State. Under section 77-29-1, the 120-day period begins when written notice is delivered to "the warden, sheriff or custodial officer in authority, or any appropriate agent of the same . . . ." Utah

Code Ann. § 77-29-1(1)(1999). Paperwork was executed on October 28th, and the slowness of the prison administration in processing the paperwork does not work to the detriment of Mr. Coleman under section 77-29-1.

With regard to the 23-day delay between 1 February 2000 and 24 February 2000, the record indicates that the principal reasons for this delay were the prosecution's failure to call a necessary witness at the preliminary hearing, the judge's scheduling conflicts, and the prosecutor's preference for a 9 a.m. hearing, as well as the defense counsel's scheduling conflicts. This provides ample support for the trial court's factual finding that this delay was not attributable to Mr. Coleman, and the State failed to marshal the evidence to show that this finding was clearly erroneous.

Finally, the dismissal of all three charges against Mr. Coleman should be affirmed because Mr. Coleman gave proper notice and request for disposition of all three charges. Mr. Coleman's "Notice and Request for Disposition of Pending Charges[]" described that there were charges of "Clandestine Lab," R. 42, and the accompanying "Office Memorandum" clarified that the charges were "Clandestine Lab; Posses[s]ion with Intent to Distribute." The "Office Memorandum" also included the case number, which referred to all three charges of Operating a

Clandestine Lab, Possession of a Controlled Substance with the Intent to Distribute, and Unlawful Possession of Drug Paraphernalia. R. 45. Thus, Mr. Coleman gave proper notice of the charges pending against him.

The State's argument, that because section 77-29-1 uses the singular term of "charge" each charge must be specified in the notice, Aplt. Br. 18, ignores the record and the basic rules of statutory construction. The record indicates that Mr. Coleman included all three charges in his "Office Memorandum" by including the case number and description of the nature of the charges. R. 45. Also, the basic rules of statutory construction indicate that, besides looking to the plain meaning of words, the singular use of words shall include the plural, and the plural the singular. Utah Code Ann. § 68-3-12(1)(a)(2000). Therefore, section 77-29-1 must be deemed to apply to "charges" pending against a defendant as well as a "charge." Under this construction, Mr. Coleman gave more than adequate notice of the "nature" of the charges pending against him.

ARGUMENT

I. THE TRIAL COURT'S DISMISSAL OF THIS CASE WAS APPROPRIATE WHERE MR. COLEMAN HAD EXECUTED A NOTICE AND DEMAND FOR 120 DAY DISPOSITION 208 DAYS EARLIER, AND THE TRIAL COURT CORRECTLY DETERMINED IN FACTUAL FINDINGS THAT MOST TIME LAPSES IN THIS CASE WERE NOT ATTRIBUTABLE TO MR. COLEMAN

The State failed to marshal the evidence to show that the trial court abused its discretion in finding that several time lapses in this case were not attributable to Mr. Coleman.[6] With regard to the calculation of the 120-day period, the trial court made the following findings of fact:

* The 120-day period began on 16 November 1999. R. 289 [32]. On the 15th, the Utah State Prison had stamped the "Notice and Request for Disposition of Pending Charges[]" as "received." R. 42.

* The period between 30 November 1999 and 21 December 1999 tolled "because of the conflict with attorneys." R. 289 [33]. On 30 November 1999 Mr. Coleman's defense counsel had appeared at the scheduled preliminary hearing and had requested a continuance

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[6] See State v. Teuscher, 883 P.2d 922, 929 (Utah Ct. App. 1994)("If the appellant fails to marshal the evidence, the appellate court assumes that the record supports the findings of the trial court and proceeds to a review of the accuracy of the lower court's conclusions of law and the application of that law in the case."); Wade v. Stangl, 869 P.2d 9, 12 (Utah Ct. App. 1994)("'If the appellant fails to marshal the evidence, the appellate court assumes that the record supports the findings of the trial court.'")(citation omitted).

because of a conflict of interest regarding the representation of Mr. Coleman and his co-defendant, Ms. Coleman. R. 283 [3-5].

* The time between 21 December 1999 and 20 January 2000 was counted "consistent with the State taking responsibility" for that time. R. 289 [33].

* The time between January 20th and March 20th was counted. The court stated, "it doesn't matter if it's the court or if it's the State, it needs to go forward. And there's no reason for me not to count those 60 days." Id. The court added later, "the court is responsible to move the cases forward too and so I don't find any basis for tolling the 120-day period between those two dates." R. 289 [35].

* The 120-day period tolled beginning on the date that Mr. Coleman filed the motion to suppress, which the trial court found to be March 30th. R. 289 [33]. The court stated, "I find that the motion to suppress does stay because that is a defendant's choice, and you have a right to have a motion to suppress. Because of that, to have that be added to the 120 days doesn't make sense." Id.

* By the time the motion to dismiss hearing was held, 114 days of the 120-day period had elapsed. Id. The court could not schedule the trial during the remaining six days, R. 289 [35-36], and the prosecutor failed to arrange a date with a different

trial judge. Therefore, this case was dismissed. R. 95. With one three-day exception,[7] the State failed to marshal the evidence to show that the trial court abused its discretion in counting any of the above days towards the 120-day period.[8]

The Utah Supreme Court recognizes that section 77-29-1 places the burden of compliance on the prosecutor. State v. Petersen, 810 P.2d 421, 426 (Utah 1991); State v. Viles, 702 P.2d 1175, 1176 (Utah 1985).[9] As the Court explained, "the prosecutor

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[7] As the State pointed out, Aplt Br. 11-12, the trial court erroneously stated that the Motion to Suppress was filed 30 March 2000. R. 289 [35]. The motion and supporting memorandum were actually filed 27 March 2000. R. 48-55.

This three-day error is not fatal to the trial court's dismissal of this case. The dismissal was signed 9 days after the hearing on the Motion to Dismiss, and that places the dismissal at precisely 120 days after Mr. Coleman filed his notice of 120-day disposition.

[8] A chart is provided in Addendum E comparing the trial court's and State's calculation of the 120-day period with Mr. Coleman's calculation.

[9] The statute provides:

> Whenever a prisoner is serving a term of imprisonment in the state prison, jail or other penal or correctional institution of this state, and there is pending against the prisoner in this state any untried indictment or information, and the prisoner shall deliver to the warden, sheriff or custodial officer in authority, or any appropriate agent of the same, a written demand specifying the nature of the charge, and the court wherein it is pending and requesting disposition of the pending charge, he shall be entitled to have the charge brought to trial within 120 days of the date of delivery of written notice.

has an affirmative duty to have the defendant's matter heard within the statutory period. Implicit in this duty is the duty to notify the court that a detainer notice has been filed and to make a good faith effort to comply with the statute." State v. Heaton, 958 P.2d 911, 915 (Utah 1998). This Court has also acknowledged that it is the prosecutor's duty to ensure that the defendant is brought to trial within 120 days after filing a notice. State v. Lindsay, 2000 UT App 379, ¶7, 411 Utah Adv. Rep. 41.

Where a defendant is not brought to trial within the proscribed time, "good cause may support the prosecutor's failure to comply." Heaton, 958 P.2d at 915-16. Good cause is not shown where "the prosecutor's failure is inaction," Id. at 916, such as "doing nothing whatsoever to bring [the defendant's] case to trial within the statutory period." Id. Neither is it shown simply by the fact that "the delay was not caused by the prosecutor." Petersen, 810 P.2d at 426.

Utah Code Ann. § 77-29-1(1)(1999). However,

> After written demand is delivered as required in Subsection (1), the prosecuting attorney or the defendant or his counsel, for good cause shown in open court, with the prisoner or his counsel being present, may be granted any reasonable continuance.

Utah Code Ann. § 77-29-1(3)(1999).

Ultimately, the trial court may find good cause based upon its underlying findings of fact with regard to the reason for the delay.[10] Some facts that have formed a reasonable basis for a finding of "good cause" for delay include conflicts of interest with the defense counsel where the delay was not prolonged; Petersen, 810 P.2d at 426-27; the defendant's request for a preliminary hearing after a hearing had already been waived; Heaton, 958 P.2d at 916; illness of the defense counsel; State v. Bullock, 699 P.2d 753, 756 (Utah 1985), and the defendant's change of defense counsel along with several requests for continuances and an agreement to postpone the trial. Phathammavong, 860 P.2d at 1004; State v. Maestas, 815 P.2d 1319, 1321 (Utah Ct. App. 1991).

In reviewing a trial court's dismissal of a case based upon the prosecutor's failure to bring an action within 120 days, the standard of review is bifurcated. Section 77-29-1 itself indicates that, where a motion to dismiss is brought:

> the [trial] court shall review the proceeding. If the court finds that the failure of the prosecuting attorney to have the matter heard within the time required is not supported by good cause, whether a previous motion for continuance was made or not, the court shall order the matter dismissed with prejudice.

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[10] Heaton, 968 P.2d at 916-17; Petersen, 810 P.2d at 427; State v. Trujillo, 656 P.2d 403, 405 (Utah 1982); State v. Phathammavong, 860 P.2d 1001, 1004 (Utah Ct. App. 1993).

Utah Code Ann. § 77-29-1(4)(1999). The trial court's interpretations of this statute are conclusions of law reviewed on appeal for correctness. Petersen, 810 P.2d at 425. However, the court's underlying factual findings which provide the basis for its decision to dismiss a case may be overturned only if they are clearly erroneous. Trujillo, 656 P.2d at 405; Phathammavong, 860 P.2d at 1004. This is because the trial court is "in an advantaged position to evaluate the evidence and determine the facts." State v. Gamblin, 2000 UT 44, ¶17 n.2, 1 P.3d 1108. Findings which are factual include findings about the cause of a delay, Trujillo, 656 P.2d at 405; which party, if any, was at fault regarding the delay, Maestas, 815 P.2d at 1321-22; and whether the delay was attributable to the defendant. Phathammavong, 860 P.2d at 1004; State v. Velasquez, 641 P.2d 115, 116-17 (Utah 1982).

In this case the trial court's underlying factual findings are at issue,[11] and the State failed to show that these findings

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[11] In its brief, the State characterizes the issue as one of law. Aplt. Br. 3-4. However, its argument is directed mainly towards the trial court's factual findings regarding whether three periods of delay, the 14-day period between 15 November 1999 and 30 November 1999, the 23-day period between 1 February 200 and 24 February 2000, and the three-day period between 27 March 2000 and 30 March 2000 were attributable to Mr. Coleman. Aplt. Br. 11-14. Thus, the proper standard of review in this case is one of clear error. Pathammavong, 860 P.2d at 1004.

were clearly erroneous. The record indicates that the prosecutor failed in her "affirmative duty to have the defendant's matter heard within the statutory period," Heaton, 958 P.2d at 915 because she failed to "notify the court that a detainer notice" had been filed, Id. and "good cause,"[12] such as "a request on the part of the defense for a continuance and/or a relatively short delay caused by unforeseen problems arising immediately prior to trial," Petersen, 810 P.2d at 426, did not support the full length of the delay. Because the State has not carried its burden, the trial court's dismissal of this case should be affirmed.

A. The Trial Court's Ruling that the Period of Delay Between 16 November 1999 and 30 November 1999 was not Attributable to Mr. Coleman is not Clearly Erroneous

The State's argument that the period between November 16th and November 30th was attributable to Mr. Coleman because the defense counsel had previously requested a preliminary hearing set a month after roll call does not demonstrate that the trial court's ruling was clearly erroneous. The State argued, "[a]t a

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[12] See Utah Code Ann. § 77-29-1(4) (1999)("If the court finds that the failure of the prosecuting attorney to have the matter heard within the time required is not supported by good cause, whether a previous motion for continuance was made or not, the court shall order the matter dismissed with prejudice.")

hearing on November 2, defendant not only requested a preliminary hearing, but expressly requested that it be set thirty days away, instead of allowing it to be set within the ten-day period provided by rule 7(g)(2), Utah Rules of Criminal Procedure [].” Aplt. Br. 12 (citation omitted). As a result, the hearing was set for November 30th when, “under normal circumstances,” it would have been set “on or before November 12.” Aplt. Br. 12-13. Therefore, the State argues, the period between November 15th and 30th is attributable to Mr. Coleman. Aplt Br. 13.

Contrary to the State's arguments, the trial court made a finding of fact that this period is not attributable to Mr. Coleman, R. 289 [32], and expressly rejected the prosecutor's argument that the period is attributable to him because of his request for a preliminary hearing. R. 289 [34]. In challenging this finding, the State failed to marshal the evidence to demonstrate that the finding is incorrect. To challenge a finding of fact, “an appellant must first marshal all the evidence that *supports* the trial court's findings. . . . After marshaling the supportive evidence, the appellant then must show that, even when viewing the evidence in a light *most favorable to the trial court's ruling*, the evidence is insufficient to support the trial court's findings.” Gamblin, 2000 UT 144, ¶17 n.2. The State completely failed to do this. Aplt. Br. 12-13. Therefore, the

State's argument should not be considered and the trial court's finding should be affirmed. Teuscher, 883 P.2d at 929-30.

Even if the State marshaled the evidence, its argument fails because the record supports the trial court's finding. Although the defense counsel appeared at roll call on November 2nd and requested a preliminary hearing "approximately a month away," he also made a comment, which was mostly inaudible on the transcript, regarding discovery. R. 285 [2]. At that time discovery had been requested from the State, R. 12-13, but had apparently not been received. R. 283 [3], R. 289 [28]. On this basis, the trial court's finding that the delay was not attributable to Mr. Coleman is supportable.[13]

Additionally, a request for a preliminary hearing, which is afforded criminal defendants charged with felonies as a matter of right, Utah Const., Art. I, Sec. 13, does not toll the 120-day

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[13] Although the trial court did not state that the delay was caused by the State's failure to provide Mr. Coleman with discovery, the court found that the delay was not attributable to Mr. Coleman. Where "'factual issues are presented to and must be resolved by the trial court but no finding of fact appears in the record, we "assume that the trier of [the] facts found them in accord with its decision, and we affirm the decision if from the evidence it would be reasonable to find facts to support it."'" State v. Robertson, 932 P.2d 1219, 1224 (Utah 1997)(quoting State v. Ramirez, 817 P.2d 774, 787 (Utah 1991)(quoting Mower v. McCarthy, 245 P.2d 224, 226 (Utah 1952))).

period. A preliminary hearing is constitutionally mandated,[14] provided for by Rule 7 of the Utah Rules of Criminal Procedure,[15] and solidly established by case law.[16] It is a normal, expected component of prosecuting a criminal defendant, and cannot be said to surprise the prosecution with extensive delays of time.[17] It

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[14] Article 1, section 13 of the Utah Constitution indicates that, "[o]ffenses heretofore required to be prosecuted by indictment, shall be prosecuted by information after examination and commitment by a magistrate, unless the examination be waived by the accused with the consent of the State, or by indictment, with or without such examination and commitment. The formation of the grand jury and the powers and duties thereof shall be as prescribed by the Legislature." Utah Const. Art. 1, Sec. 13.

[15] Rule 7(g)(1) of the Utah Rules of Criminal Procedure provides that, "If a defendant is charged with a felony, the defendant shall be advised of the right to a preliminary examination. If the defendant waives the right to a preliminary examination, and the prosecuting attorney consents, the magistrate shall order the defendant bound over to answer in the district court." Utah R. Crim. Pro. 7(g)(1)(2001).

[16] Case law has long recognized a criminal defendant's right to a preliminary hearing. See State v. Ortega, 751 P.2d 1138, 1139 (Utah 1988)(defendant was denied his right to a preliminary hearing where the testimony presented at trial involved a criminal episode for which he had not been bound over); State v. Jensen, 136 P.2d 949, 954-55 (Utah 1943)(defendant can't be tried and convicted on a charge upon which he was not given, or on which he did not waive, any preliminary hearing).

[17] The circumstances here are distinguishable from this in State v. Heaton. In Heaton, the Utah Supreme Court found that the delay was attributable to the defendant because he had initially waived a preliminary hearing. Heaton, 958 P.2d at 916. Then, 30 days later, he changed his mind and requested a preliminary hearing. Id. at 913. If he had not changed his mind, the defendant would have been brought to trial "just 6 days after his written notice had been delivered." Id. at 916. Thus, the delay was attributable to the defendant in that case.

does not provide "good cause" for "the failure of the prosecuting attorney to have the matter heard within the time required . . . ." Utah Code Ann. § 77-29-1(4)(1999). Even more importantly, it does not demonstrate that the trial court's factual finding that the period between November 15th and November 30th was not attributable to Mr. Coleman was clearly erroneous.

B. Eighteen Days Should be Added to the Trial Court's Original Calculation Because the Period of November 15th Through November 30th Properly Began on October 28th, When Mr. Coleman Executed the 120-Day Disposition Notice

The trial court's ruling that the 120-day period commenced on November 15th was incorrect because the period properly began on October 28th, and 18 days should be added to the trial court's original calculation. The trial court's explanation for this ruling was as follows:

> The defendant filed his 120-day disposition papers on October 28th. I'm finding that the operative date to begin calculating the 120-day period is November 16th. And that is giving the benefit, frankly, to the state prison. Once it's at least logged in to the State, the prison records, it's the duty of the prison to move it immediately forward. So that's the date I'm starting from, between November 16th and November 30th. It's a 14-day period that is part of the, that I'm calculating

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In this case, Mr. Coleman did not waive his right to a preliminary hearing and then later change his mind. He merely refrained from waiving his statutory right to a preliminary hearing which would have taken place in the absence of affirmative waiver.

as part of this 120-day period.

R. 289 [32]. Contrary to this ruling, under the 120-day disposition statute the court was not entitled to give the benefit of those 18 days to the State, but should have counted them as part of the 120-day period.

The statute indicates that the 120-day period commences when written notice is delivered to "the warden, sheriff or custodial officer in authority, or any appropriate agent of the same . . ." Utah Code Ann. § 77-29-1(1)(1999). Further, it is the duty of the "warden, sheriff or custodial officer, upon receipt of the demand . . ." to "cause the demand to be forwarded by personal delivery or certified mail, return receipt requested, to the appropriate prosecuting attorney and court clerk." Utah Code Ann. § 77-29-1(2)(1999).

Here the 120-day period commenced on October 28th because that was date on which Mr. Coleman executed the notice, and the evidence supports that he delivered it on that date. R. 42, 45. The evidence, fully marshaled in favor of the trial court's finding that the 120-day period commenced on November 15th, not only fails to support the court's finding but supports that Mr. Coleman executed and delivered the Notice on October 28th. The evidence is as follows:

* Wasatch Records and the Utah State Prison stamped the

"Notice and Request for Disposition of Pending Charges[]" as "Received" on November 15th. R. 42. However, the Notice, along with the accompanying paper entitled "Division of Institutional Operations Office Memorandum" is dated October 28th.

* "Authorized Agent" Mary Brockbader signed the Notice on December 6th, and then prepared the "Certificate of Inmate Status" for the "Salt Lake County Attorney." R. 42-44. That day, she also wrote a letter indicating Mr. Coleman was filing a 120-day notice for "untried charges of Clandestine Lab, Poss with intent to dist . . . ." R. 46.

* On December 14th, $5.96 was deducted from Mr. Coleman's prison account, as indicated on the "Offender of Account Activity." R. 47.

This evidence indicates that the prison was not punctual in processing Mr. Coleman's Notice. The Notice was not signed in by an authorized agent and forwarded to the prosecutor and trial court until 21 days after it had been stamped "Received." R. 42-46. Then, the funds for postage and processing were not deducted until 8 days after the Notice had been processed and mailed. R. 47. The most logical inference from this is that the prison received Mr. Coleman's Notice on the day he executed it, which was October 28th, and, consistent with its later handling of the paperwork, was slow to acknowledge it. There is nothing in the

record to indicate that the Notice was not delivered on October 28th, and the trial court itself noted that it was giving the benefit of the doubt to the prison. R. 289 [32].

Under the 120-day disposition statute, the prison's slowness in processing and forwarding paperwork does not work to the detriment of Mr. Coleman.[18] If it did, paperwork could be kept in the prison administration system indefinitely, preventing the 120-day period from commencing, and thereby rendering the 120-day detainer statute illusory. Because this statute was enacted to "precisely define what is meant by `speedy trial' as that term is used in the constitutions of the various states,"[19] the constitutional right to a speedy trial would be compromised if this Court holds that the prison administration may indefinitely postpone commencement of the 120-day period by holding up paperwork.

Thus, the 120-day period should not have been calculated from November 15th, but should have been calculated from October 28th, when Mr. Coleman executed the proper paperwork.

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[18] Administrative errors are not "good cause" which justify the prosecutor's failure to bring a defendant to trial within the 120-day period. See Heaton, 958 P.2d at 915 (court clerk's error did not constitute "good cause" for the prosecutor's failure to bring defendant to trial within 120 days.)

[19] State v. Wilson, 453 P.2d 158, 159 (Utah 1969); accord Velasquez, 641 P.2d at 116; Trujillo, 656 P.2d at 404.

C. **Because the Primary Reason for Continuing the January 20th Hearing was the Prosecutor's Failure to Call a Key Witness, the Trial Court Correctly Found that the Period Between 1 February 2000 and 24 February 2000 was not Attributable to Mr. Coleman**

The State's argument that the defense counsel's scheduling conflict constituted "good cause" for the period of delay between 1 February 2000 and 24 February 2000 does not demonstrate that the trial court's contrary finding was clearly erroneous where the prosecutor failed to call a key witness at the January 20th hearing. The State indicates that the preliminary hearing held January 20th was "continued for two reasons: 1) the trial judge had another commitment that afternoon; and 2) defense counsel wanted to subpoena an officer who was not present on that date []." Aplt. Br. 13 (citation omitted). The State argues that the date of February 1st was available, but because the defense counsel was unavailable on that date, the date of February 24th was chosen. Id. Thus, the State argues, 23 days between 1 February 2000 and 24 February 2000 should not have been counted in the trial court's calculation of the 120-day period. Aplt. Br. 13-14.

The State failed to marshal the evidence to show that the trial court's finding that this delay was not attributable to Mr. Coleman is clearly erroneous, and so this Court should assume

that the record supports the court's finding.[20]

Additionally, an examination of the record indicates that there is ample support for the trial court's finding. At the January 20th hearing, the prosecutor failed to present Officer Carrie Geer, who made the original entry into the motel room where Mr. Coleman was arrested, R. 286 [4-5], R. 287 [57-61], and it was this oversight which necessitated a continuance of the hearing. Officer Geer first saw a package of what she thought was marijuana in the motel room, saw a fog at the top of the room that made her eyes and skin burn, and saw ingredients and packaging material often used in the production of methamphetamine. R. 287 [59-60]. Officer Geer told the other officers, who were standing in the doorway, that she though there was methamphetamine in the room. R. 287 [61]. Because of information provided by her, the officers entered the room. Id. Ultimately, the room was searched and Mr. Coleman was arrested. R. 286 [19-23]. Officer Geer's testimony was therefore necessary for the preliminary hearing.

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[20] See Teuscher, 883 P.2d at 929("If the appellant fails to marshal the evidence, the appellate court assumes that the record supports the findings of the trial court and proceeds to a review of the accuracy of the lower court's conclusions of law and the application of that law in the case."); Wade, 869 P.2d at 12("'If the appellant fails to marshal the evidence, the appellate court assumes that the record supports the findings of the trial court.'")(citation omitted).

There is no indication that the trial court was prepared to bind Mr. Coleman over for trial in the absence of Officer Geer's testimony. The court indicated interest in Officer Geer's testimony, R. 286 [4, 6], and made no overtures regarding a finding of probable cause[21] without her testimony. R. 286 [4-9, 71-72]. Thus, the primary reason for the continuance was the prosecutor's failure to call this material witness.

In rescheduling, the defense counsel's unavailability on one date does not make Mr. Coleman responsible for a delay which was necessitated by the prosecutor's failure to call Officer Geer. Even if it did, the trial court's schedule, the prosecutor's preference for a 9 a.m. hearing, R. 286 [71], and the defense counsel's unavailability on February 1st all contributed to rescheduling on February 24th at 9 a.m. The prosecutor had stated that she preferred to reschedule a 9 a.m. hearing, R. 286 [71], and the defense counsel had said he had a conflict with rescheduling on February 1st. Id. Both preferences were taken into account in rescheduling. Id. Significantly, the prosecutor, who had a duty to inform the trial court of the need for urgency

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[21] Under Utah Rule of Criminal Procedure 7(h)(2) a defendant may not be bound over unless evidence presented at a preliminary hearing establishes "probable cause to believe that the crime charged has been committed and that the defendant has committed it." Utah R.Crim.Proc. 7(h)(2)(2000).

due to the notice and demand for 120-day disposition,[22] did not so inform the court. In these circumstances, the trial court's finding that the period between February 1st and February 24th is not attributable to Mr. Coleman is not clearly erroneous.

II BECAUSE MR. COLEMAN GAVE PROPER NOTICE OF HIS DEMAND FOR DISPOSITION OF PENDING CHARGES, THE TRIAL COURT'S DISMISSAL OF ALL THREE CHARGES IN THIS CASE FOR FAILURE TO PROSECUTE WITHIN 120 DAYS WAS NOT PLAIN ERROR

Mr. Coleman's "Notice and Request for Disposition of Pending Charges[]," R. 42, and accompanying "Office Memorandum," R. 45, properly conformed to the notice requirements of section 77-29-1. Under section 77-29-1, the notice must be "a written demand specifying the nature of the charge and the court wherein it is pending," and it must request "disposition of the pending charge." Utah Code Ann. § 77-29-1(1999).

Mr. Coleman's "Notice and Request for Disposition of Pending Charges[]" stated that he was requesting "final disposition of any charge(s) now pending against me in any court in the State of Utah. Charges of Clandestine Lab are now pending against me in

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[22] See Heaton, 958 P.2d at 915 ("When a prisoner delivers a written notice pursuant to the detainer statute, the prosecutor has an affirmative duty to have the defendant's matter heard within the statutory period. Implicit in this duty is the duty to notify the court that a detainer notice has been filed and to make a good faith effort to comply with the statute.")

the Third District Court, Salt Lake County . . ." R. 42. The accompanying "Office Memorandum" clarified that the crimes charged were "Clandestine Lab; Posses[s]ion with Intent to Distribute," and that the case number was 991920662 FS. R. 45. All three charges pending against Mr. Coleman, including operation of a clandestine laboratory, possession with intent to distribute, and use or possession of drug paraphernalia, were charged in the same Information, R. 3-6, and were included in case number 991920662 FS. Thus, Mr. Coleman properly gave notice and demand of disposition of all three charges that were pending against him.

The State argues, however, that the trial court committed plain error in dismissing all three charges pending against Mr. Coleman because he "invoked the Statute only as to one charge" Aplt. Br. 15. This argument is based on Mr. Coleman's "Notice and Request for Disposition of Pending Charges[]," which specifies only the charge of "Clandestine Lab." Aplt. Br. 16. The State points out that section 77-29-1 uses the singular term of "charge" when describing the requirements of the notice, and that "strict compliance" with this statute therefore requires specification of each charge in the notice. Aplt. Br. 18. Therefore, the State argues, "the fact that the defendant specified only one of three charges seems to suggest he did not

care about speedy disposition of the remaining two charges," and these charges are still viable. Aplt. Br. 17.

This argument completely ignores Mr. Coleman's "Office Memorandum," attached to his Notice, which described the clandestine lab charge, the possession with intent to distribute charge, and provided the specific case number, which includes all three charges. R. 45.

The State's argument also ignores basic rules of statutory construction. In interpreting statutes, "`[t]his court's primary objective . . . is to give effect to the legislature's intent.'" State v. Lindsay, 2000 UT. App. 379, ¶ 5, 411 Utah Adv. Rep. 41 (citation omitted). "`When examining a statute, we look first to its plain language as the best indicator of the legislature's intent and purpose in passing the statute.'" Id. "Unless a literal reading would render the statute's wording unreasonably inoperable or confusing, we accord the wording its 'usual and accepted meaning' and do not 'look beyond plain and unambiguous language to ascertain legislative intent.'" Deland v. Uintah County, 945 P.2d 172, 174 (Utah Ct. App. 1997). Pertinent to this case is the rule of construction articulated in Utah Code Ann. § 68-3-12(1), which states:

> In the construction of these statutes, the following general rules shall be observed, unless such construction would be inconsistent with the manifest

> intent of the Legislature or repugnant to the context of the statute: (a) The singular number includes the plural, and the plural the singular.

Utah Code Ann. § 68-3-12(1)(a)(2000). Accord Deland, 945 P.2d at 174.

With regard to section 77-29-1, Mr. Coleman's "Notice and Disposition of Pending Charges[]" and accompanying "Office Memorandum" adequately filled the notice requirements for all three charges pending against him. The words used by the statute indicate that the "nature of the charge" must be specified. Utah Code Ann. § 77-29-1(1)(1999). These words do not mean that a strict, technically-correct, all-inclusive statement must be made regarding the charges. It simply requires that the "nature" of the charges be specified. "Nature," used in this context, is defined as "the inherent character or basic constitution of a person or thing: essence." Merriam-Webster, Inc., Merriam-Webster's Collegiate Dictionary, 774 (10th ed. 1997). Here, the "nature" of the charges was described by Mr. Coleman in his paperwork.

Additionally, the use of the singular term "charge" in section 77-29-1(1) does not indicate a need for more exact specificity. With regard to statutory interpretation, "[t]he singular number includes the plural and the plural the singular." Id. (quoting Utah Code Ann. § 68-3-12(1)(a)(1996)). Accordingly,

this Court and the Utah Supreme Court have often used the phrase "charges," and well as "charge," when analyzing section 77-29-1(1).[23] Significantly, in State v. Lindsay, this Court perceived that section 77-29-1 contemplates that all charges contained in one information are treated together. In holding that a notice of 120-day disposition is not viable until formal charges are filed against a prisoner, this Court said, "[i]t is not appropriate to tender a request in anticipation of forthcoming charges, as the statute *speaks in terms of an untried information 'pending against the prisoner.'*" Lindsay, 2000 UT App 379, ¶10 (emphasis added). This is in harmony with this Court's previous observation that "an information often *must* include multiple counts," DeLand, 945 P.2d at 174, which are treated together.[24] Finally, there is

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[23] State v. Wright, 745 P.2d 447, 451 (Utah 1987)(holding that the notice at issue did "not specify the *charges*, as required by section 77-29-1(1).")(emphasis added); Lindsay, 2000 UT App 379, ¶ 10 (holding that "formal *charges* must be pending against [a defendant] when the request is delivered. It is not appropriate to tender a request in anticipation of forthcoming *charges* . . . .")(emphasis added).

[24] Rule 9.5 of the Utah Rules of Criminal Procedure provides that, "[u]nless provided by law, complaints, citations, or informations charging multilple offenses, which may include violations of state laws, county ordinances, or municipal ordinances and arising from a single criminal episode as defined by Section 75-1-401, shall be filed in a single court that has jurisdiction of the charged offense with the highest possible penalty of all the offenses charged." Utah R. Crim. P. 9.5 (2001).

no reason to treat the charges separately in this case, particularly where the prosecutor herself did not differentiate between them below. R. 56-67. Therefore, the descriptions provided by Mr. Coleman of the nature of the charges against him are not rendered inadequate on the basis of the use of the singular word "charge" in the statute.

As a final note, the legislature's purpose in enacting this statute and its predecessor "was to protect the constitutional right of prisoners to a speedy trial and to prevent those charged with enforcement of criminal statutes from holding over the head of a prisoner undisposed charges against him." Trujillo, 656 P.2d 404. Other statutes enacted for this very purpose have been liberally construed in order to effectuate the purpose. For instance, the Interstate Agreement on Detainers, Utah Code Ann. § 77-29-5(1999), which requires a prisoner to be brought to trial within 180 days after the delivery of written notice requesting final disposition of the information, is interpreted as requiring "substantial" rather than "strict" compliance because of the "emphasis on the protection of prisoners' rights . . . ." State v. Martin, 765 P.2d 854, 856 (Utah 1988).

In this case, Mr. Coleman's "Notice and Request for Disposition of Pending Charges[]" gave proper notice of all three charges under section 77-29-1, but even if it did not, the

legislature's intent in enacting section 77-29-1 would not be effectuated by reversing the trial court's dismissal of all three charges. The charges were all part of the same Information specified by the case number in Mr. Coleman's "Office Memorandum," and the nature of the charges, which were drug charges, was clearly indicated in both the notice and memorandum. In these circumstances, a reversal of the trial court's dismissal of all three charges would oppose the legislature's intent in enacting the statute.

Therefore, the State's argument that the trial court's dismissal of all these charges was plain error fails under the first requirement of successfully challenging a ruling under the plain error analysis. That requirement is to show that "an error exists," State v. Dunn, 850 P.2d 1201, 1208 (Utah 1993), and the State did not show that here.[25] As a matter of law, the trial

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[25] Because the State's argument fails under the first requirement, it is unnecessary to analyze the argument under the second and third requirements. However, the State's argument also fails under those requirements.

The second requirement, that the error should have been obvious to the trial court, Dunn, 850 P.2d at 1208, is not met because the three charges were all part of the same information, R. 3-6, were included in the case number specified in Mr. Coleman's "Office Memorandum," R. 45, were treated together in the same preliminary hearing, motions to suppress, and motion to dismiss, R. 22-23, 34-35, 39-41, 48-55, and were not ever differentiated to the court by either party. Thus, dismissing all three charges was not an obvious error.

court's dismissal of the three charges against Mr. Coleman should be affirmed.

CONCLUSION

The trial court's dismissal of all three charges pending against Mr. Coleman should be affirmed because a total of 138 days not attributable to Mr. Coleman had passed when the trial court dismissed the charges on May 23rd.[26] This is well beyond the 120-day period which the State had to bring Mr. Coleman to trial, and the trial court did not err in dismissing this case.

RESPECTFULLY SUBMITTED this 23rd day of April, 2001.

HEATHER JOHNSON
Attorney for Defendant/Appellant

JAMES A. VALDEZ
Attorney for Defendant/Appellant

The third requirement, that the error is harmful and that in its absence there is reasonable likelihood of a more favorable outcome for the State, Dunn, 850 P.2d at 1208, is not met because, even if section 77-29-1 is interpreted according to the State's argument regarding technical specificity of each individual charge, Mr. Coleman met this requirement. He specified the case number, which included all of the charges, in his paperwork and this provided even more information than the required description of the "nature" of the charges.

[26] See the "120 Day Disposition Calculation Comparison" attached in Addendum E.

CERTIFICATE OF DELIVERY

I, HEATHER JOHNSON, hereby certify that I have caused to be hand-delivered eight copies of the foregoing to the Utah Court of Appeals, 450 South State Street, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, Third Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 23rd day of April, 2001.

Heather Johnson
HEATHER JOHNSON

DELIVERED to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this ____ day of April, 2001.

_____

ADDENDUM A

JAMES A. VALDEZ (3308)
Attorney for Defendant
SALT LAKE LEGAL DEFENDER ASSOCIATION
424 East 500 South Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 532-5444

IN THE THIRD JUDICIAL DISTRICT COURT, STATE OF UTAH

SALT LAKE COUNTY

THE STATE OF UTAH, Plaintiff, LARRY COLEMAN, Defendant.	: : : : : : : :	ORDER OF DISMISSAL Case No. 991920662FS JUDGE JUDITH ATHERTON

Defendant, LARRY COLEMAN, represented by counsel, JAMES A. VALDEZ, having motioned this Court to dismiss the Information in the above-entitled case on grounds that prosecution of this case is barred under Utah Code Ann. §77-29-1 (1999) (requiring the State to bring an incarcerated defendant to trial within 120 days of receiving notice from the defendant requesting disposition of pending charges) and the State having failed to so do.

FOR GOOD CAUSE SHOWN, the above entitled matter is hereby dismissed with prejudice.

DATED this 23rd, day of May 2000.

JUDGE JUDITH ATHERTON
THIRD DISTRICT COURT JUDGE

MAILED/DELIVERED a copy of the foregoing to the office of the Brenda Beaton Assistant Attorney General acting in behalf of Salt Lake District Attorney, 348 East South Temple, Salt Lake City, Utah 84111 this _____ of May, 2000.

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ADDENDUM B

CHAPTER 29
DISPOSITION OF DETAINERS AGAINST PRISONERS

Section		Section	
77-29-1.	Prisoner's demand for disposition of pending charge — Duties of custodial officer — Continuance may be granted — Dismissal of charge for failure to bring to trial.	77-29-6.	Interstate agreement — "Appropriate court" defined.
77-29-2.	Duty of custodial officer to inform prisoner of untried indictments or informations.	77-29-7.	Interstate agreement — Duty of state agencies and political subdivisions to cooperate.
77-29-3.	Chapter inapplicable to incompetent persons.	77-29-8.	Interstate agreement — Application of habitual criminal law.
77-29-4.	Escape of prisoner voids demand.	77-29-9.	Interstate agreement — Escape of prisoner while in temporary custody.
77-29-5.	Interstate agreement on detainers — Enactment into law — Text of agreement.	77-29-10.	Interstate agreement — Duty of warden.
		77-29-11.	Interstate agreement — Attorney general as administrator and information agent.

77-29-1. Prisoner's demand for disposition of pending charge — Duties of custodial officer — Continuance may be granted — Dismissal of charge for failure to bring to trial.

(1) Whenever a prisoner is serving a term of imprisonment in the state prison, jail or other penal or correctional institution of this state, and there is pending against the prisoner in this state any untried indictment or information, and the prisoner shall deliver to the warden, sheriff or custodial officer in authority, or any appropriate agent of the same, a written demand specifying the nature of the charge and the court wherein it is pending and requesting disposition of the pending charge, he shall be entitled to have the charge brought to trial within 120 days of the date of delivery of written notice.

(2) Any warden, sheriff or custodial officer, upon receipt of the demand described in Subsection (1), shall immediately cause the demand to be forwarded by personal delivery or certified mail, return receipt requested, to the appropriate prosecuting attorney and court clerk. The warden, sheriff or custodial officer shall, upon request of the prosecuting attorney so notified, provide the attorney with such information concerning the term of commitment of the demanding prisoner as shall be requested.

(3) After written demand is delivered as required in Subsection (1), the prosecuting attorney or the defendant or his counsel, for good cause shown in open court, with the prisoner or his counsel being present, may be granted any reasonable continuance.

(4) In the event the charge is not brought to trial within 120 days, or within such continuance as has been granted, and defendant or his counsel moves to dismiss the action, the court shall review the proceeding. If the court finds that the failure of the prosecuting attorney to have the matter heard within the time required is not supported by good cause, whether a previous motion for continuance was made or not, the court shall order the matter dismissed with prejudice.

History: C. 1953, 77-29-1, enacted by L. 1980, ch. 15, § 2.

Cross-References. — Right to speedy trial, Utah Const., Art. I, § 12; § 77-1-6.

NOTES TO DECISIONS

ANALYSIS

Burden of compliance.
Commencement of period.
Delay caused by codefendant's action.
Delay caused by prisoner.
Dismissal with prejudice.
Forfeiture.
Good cause for delay.
Premature request.
Prosecutor's delay.
Showing of prejudice.
Standard of review.
Warden's delay.
Written demand.

Burden of compliance.

The language of Subsection (4) clearly places the burden of complying with the statute on the prosecutor. State v. Petersen, 810 P.2d 421 (Utah 1991).

The trial court erred in concluding that defendant was in the same position as was the state and therefore shared some of the responsibility to find out why his case had not been set for trial. State v. Heaton, 958 P.2d 911 (Utah 1998).

The trial court erred in concluding that a delay caused by the court clerk's error constituted "good cause" and thereby relieved the prosecutor of its burden under this section. State v. Heaton, 958 P.2d 911 (Utah 1998).

Commencement of period.

Ninety-day period for prosecution under former § 77-65-1 commenced on the day defendant notified county attorney of his request for final disposition of case or cases pending against him; and the filing of a complaint, information or indictment did not affect the commencement of the period. State v. Moore, 521 P.2d 556 (Utah 1974).

Motion to dismiss charges against defendant who was brought to trial 92 days after warden received notice of his request for final disposition of pending charges was properly denied since computation of then 90-day time period commenced from date that notice was delivered to county attorney and appropriate court. State v. Taylor, 538 P.2d 310 (Utah 1975).

Delay caused by codefendant's action.

Defendant was not entitled to a dismissal of the charges where the trial was delayed beyond the 120-day time period, and the trial court did not abuse its discretion in finding that there was good cause for the delay, where the delay was reasonable and not the result of the prosecution's actions or inactions, but was due to a codefendant, who was to be jointly tried with defendant and who was expected to plead guilty at trial as the result of plea negotiations, changing his plea to not guilty on the scheduled trial date. State v. Trujillo, 656 P.2d 403 (Utah 1982).

Delay caused by prisoner.

Where statute provided that prisoner be brought to trial within ninety days of his request for disposition of pending charges, the ninety-day disposition period was to be extended by the amount of time during which defendant himself created delay. State v. Velasquez, 641 P.2d 115 (Utah 1982).

When a defendant causes a trial to be delayed, he temporarily waives the right to a speedy trial. State v. Banner, 717 P.2d 1325 (Utah 1986); State v. Maestas, 815 P.2d 1319 (Utah Ct. App.), cert. denied, 826 P.2d 651 (Utah 1991); State v. Sioudonne Phathammavong, 860 P.2d 1001 (Utah Ct. App. 1993).

Because defendant's own actions in requesting continuances, changing counsel, and agreeing to postpone trial until after disposition of pretrial motions were the main cause of delay and because defendant failed to show any prejudice caused by the delay, he was not denied his constitutional right to a speedy trial. State v. Maestas, 815 P.2d 1319 (Utah Ct. App.), cert. denied, 826 P.2d 651 (Utah 1991).

Dismissal with prejudice.

Defendant's convictions were reversed and the charges against him dismissed with prejudice, where the trial date was set for 218 days beyond the time defendant filed the notice of disposition, and the trial court's finding of good cause could not be supported by a conclusion that the delay was for the purpose of allowing time for defendant and his counsel to resolve their conflicts. State v. Petersen, 810 P.2d 421 (Utah 1991).

Forfeiture.

Defendant did not forfeit his right to have charges against him dismissed by remaining silent and failing to request an earlier setting when trial court set date for trial beyond ninety-day period required under former § 77-65-1; burden of complying with statute rested on prosecutor. State v. Wilson, 22 Utah 2d 361, 453 P.2d 158 (1969).

Good cause for delay.

Where defendant's trial date was originally set for time within ninety-day period provided

ADDENDUM C

SC

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Attorneys for Defendant/Appellee

FILED
Utah Court of Appeals
FEB 12 2001
Paulette Stagg
Clerk of the Court

IN THE UTAH SUPREME COURT

THE STATE OF UTAH,	:	**MOTION TO DISMISS AND REQUEST TO STAY BRIEFING**
Plaintiff/Appellant,	:	
v.	:	
LARRY DEAN COLEMAN,	:	Case No. 20000626-SC Priority No. 15
Defendant/Appellee.	:	

COMES NOW Defendant/Appellee Larry Dean Coleman, by and through counsel, Heather Johnson, and respectfully submits this motion to dismiss on the grounds that this Court lacks original appellate jurisdiction pursuant to Utah Code Ann. § 78-2-2(3)(j)(1996) and Utah Code Ann. § 78-2a-3(2)(e)(1996).

Appellee further requests that this Court stay the briefing schedule pending resolution of this motion. Appellant, the State of Utah, filed its opening brief in this Court on 29 December 2000; Appellee's brief is currently due on 27 February 2001.

RESPECTFULLY SUBMITTED this 12th day of February, 2001.

Heather Johnson
HEATHER JOHNSON
Attorney for Defendant/Appellee

HEATHER JOHNSON
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Attorneys for Defendant/Appellee

IN THE UTAH SUPREME COURT

THE STATE OF UTAH,	:	**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS AND**
Plaintiff/Appellant,	:	**REQUEST TO STAY BRIEFING**
v.	:	
LARRY DEAN COLEMAN,	:	Case No. 20000626-SC Priority No. 15
Defendant/Appellee.	:	

STATEMENT OF RELIEF SOUGHT

Defendant/Appellee Larry Dean Coleman ["Mr. Coleman"], by and through counsel, Heather Johnson, hereby submits this memorandum in support of Appellee's motion to dismiss and request to stay briefing. Mr. Coleman respectfully requests this Court to dismiss the above-entitled action on the grounds that this Court lacks original appellate jurisdiction pursuant to Utah Code Ann. § 78-2-2(3)(j)(1996) and Utah Code Ann. § 78-2a-3(2)(e)(1996). Mr. Coleman further requests that this Court stay the briefing schedule pending resolution of this motion.

FACTUAL BACKGROUND

Mr. Coleman was arrested on 28 September 1999 and later

charged by Information with the operation of a clandestine laboratory, a second degree felony in violation of Utah Code Ann. § 58-37d-4(1)(a) and/or (b)(1998);[1] possession of a controlled substance with intent to distribute, a second degree felony in violation of Utah Code Ann. § 48-37-8(1)(a)(iii)(1998); and possession of drug paraphernalia, a class B misdemeanor in violation of Utah Code Ann. § 58-37a-5(1998). R. 3-4. After these charges were filed, Mr. Coleman, who was incarcerated at the Utah State Prison, R. 46, executed a "Notice and Request for Disposition of Pending Charge[s]." R. 42. This Request was dated 28 October 1999, and was stamped "received" by the Wasatch Records Division at the Utah State Prison in November. R. 42. Mary Brockbrader, an authorized agent in the Record Unit at the Utah State Prison, certified her receipt of the Request on 6 December 1999. R. 42.

A preliminary hearing was held 20 January 2000 and continued until 24 February 2000. R. 21-35. Thereafter, Mr. Coleman was

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[1] Notice was given in the Information that Mr. Coleman was subject to the enhanced penalty of a first degree felony pursuant to Utah Code Ann. § 58-37d-5(1)(d), (f), and/or (g) because "the intended laboratory operation was to, or did, take place within 500 feet of a residence, place of business, church, or school; and/or the clandestine laboratory operation actually produced an amount of a specified controlled substance . . ., and/or the intended laboratory operation was for the production of Methamphetamine base." R. 3.

bound over for arraignment. R. 35. In March, Mr. Coleman indicated his intent to file a motion to suppress evidence and a motion to dismiss the charges due to the State's failure to prosecute within 120 days after receiving the Request for Disposition. R. 282 [5-7]. Hearings on these motions were held in May. R. 288, 289. The trial court dismissed[2] the charges in the Information on 23 May 2000 due to the State's failure to bring Mr. Coleman to trial within 120 days after receiving a Request for Disposition. R. 95.[3] The State filed a notice of appeal to this Court on 20 June 2000. R. 97.

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[2] A copy of the trial court's "Order of Dismissal," R. 95, is attached as Addendum A.

[3] The dismissal was pursuant to Utah Code Ann. § 77-29-1(1)(1999)("Whenever a prisoner is serving a term of imprisonment in the state prison, jail or other penal or correctional institution of this state, and there is pending against the prisoner in the state any untried indictment or information, and the prisoner shall deliver to the warden, sheriff or custodial officer in authority, or any appropriate agent of the same, a written demand specifying the nature of the charge and the court wherein it is pending and requesting disposition of the pending charge, he shall be entitled to have the charge brought to trial within 120 days of the date of delivery of written notice.")

MEMORANDUM OF POINTS AND AUTHORITIES

BECAUSE THE COURT OF APPEALS HAS ORIGINAL APPELLATE JURISDICTION IN THIS CASE PURSUANT TO UTAH CODE ANN. § 78-2a-3(2)(e)(1996), SECTION 78-2-2(3)(j), WHICH PROVIDES THIS COURT WITH JURISDICTION WHERE THE COURT OF APPEALS "DOES NOT HAVE ORIGINAL APPELLATE JURISDICTION," DOES NOT APPLY

The Court of Appeals has original appellate jurisdiction in this case because this is a criminal case appealed from the trial court's final judgment of dismissal due to the State's failure to bring Mr. Coleman to trial within 120 days after receiving a Request for Disposition. R. 95. Section 78-2a-3 of the Utah Code indicates that "[t]he Court of Appeals has appellate jurisdiction . . . over: (e) appeals from a court of record in criminal cases, except those involving a conviction of a first degree or capital felony . . ." Utah Code Ann. § 78-2a-3(2)(e)(1996).[4] This statute confers original appellate jurisdiction to the Court of Appeals in this case because:

(1) The third judicial district court, from which this appeal originates, is a court of record. State v. Fisk, 966 P.2d 860, 863 (Utah Ct. App. 1998).

(2) This is a criminal case. R. 3-6.

(3) This case does not involve a conviction of a first degree or capital felony. Mr. Coleman did not plead guilty to the charges,

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[4] The full text of Utah Code Ann. § 78-2a-3(1996) is attached as Addendum B.

R. 36-37, and he was not ever brought to trial and found guilty because the trial court dismissed the case based on the State's failure to bring Mr. Coleman to trial within 120 days after receiving a Request for Disposition. R. 95.[5]

Thus, the Court of Appeals has original appellate jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(e)(1996).

Additionally, neither the docketing statement[6] nor the opening brief filed by the State provide jurisdictional authority for this Court to hear this appeal. In its docketing statement, filed 11 July 2000, the State cites to Utah Code Ann. § 77-18a-1(2)(a)(1999)[7] and § 78-2-2(3)(i)(1996) in support of its

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[5] Additionally, this case arguably does not even involve a first degree or capital felony. The Information charged Mr. Coleman with two second degree felonies and a class B misdemeanor. R. 3-6.

Notice was given in the Information that Mr. Coleman was subject to the enhanced penalty of a first degree felony pursuant to Utah Code Ann. § 58-37d-5(1)(d), (f), and/or (g). R. 3. However, because this case did not proceed further, that enhancement was not invoked.

[6] The appropriate subsection granting jurisdiction to the Utah Supreme Court must be cited in the docketing statement to alert the Court that it has original appellate jurisdiction over the case. Gregory v. Fourthwest Invs., Ltd., 735 P.2d 33, 34 (Utah 1987).

[7] The State actually cites to the 1998 supplement of section 77-18a-1(2)(a). However, because the 1999 edition is identical to the 1998 supplement, Mr. Coleman cites to the more recent 1999 edition.

assertion that this Court has jurisdiction in this case. However, section 77-18a-1(2)(a) simply grants the prosecution authority to appeal from final judgments of dismissal.[8] Section 78-2-2(3)(i) states that this Court has jurisdiction over "appeals from the district court involving a conviction of a first degree or capital felony." Utah Code Ann. § 78-2-2(3)(i)(1996). Because this case does not involve a conviction for a first degree or capital felony, R. 36-37, 95, section 78-2-2(3)(i) does not provide this Court with jurisdiction.

In its opening brief, the State cites Utah Code Ann. § 78-2-2(3)(j)(1996) in stating that this Court has jurisdiction to hear this appeal. Aplt. Br. 3. That section indicates that "[t]he Supreme Court has appellate jurisdiction . . . over: (j) orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction . . ." Utah Code Ann. § 78-2-2(3)(j)(1996).[9] However, because the Court of Appeals has original appellate jurisdiction in this case, section 78-2-2(3)(j) does not provide jurisdiction for this

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[8]Section 77-18a-1(2)(a) states that the prosecution may appeal from "a final judgment of dismissal, including a dismissal of a felony information following a refusal to bind the defendant over for trial." Utah Code Ann. § 77-18a-1(2)(a)(1999).

[9]The full text of Utah Code Ann. § 78-2-2(1996) is attached as Addendum C.

Court.

In light of the above, briefing in this case should be stayed and this case should be dismissed from this Court.[10]

RESPECTFULLY SUBMITTED this 12th day of February, 2001.

HEATHER JOHNSON
Attorney for Defendant/Appellee

[10] This motion should not be denied on the basis that this case has already been opened and the State has already filed its initial brief. "Whether by [discovery of the court] or by motion of a party, dismissal for lack of jurisdiction will be considered at any stage of the proceedings when it appears that jurisdiction is, in fact, lacking." Silva v. Department of Employment Security, 786 P.2d 246, 247 (Utah Ct. App. 1990). Further, "[t]he parties cannot by their silent acquiescence invest jurisdiction upon this court when the requisite elements are absent." Id.

CERTIFICATE OF DELIVERY

I, HEATHER JOHNSON, hereby certify that I have caused to be hand-delivered the original and four copies of Appellee's "Motion to Dismiss and Request to Stay Briefing" and Appellee's "Memorandum in Support of Motion to Dismiss and Request to Stay Briefing" to the Utah Supreme Court, 450 South State Street, Salt Lake City, Utah 84114-0230, and one copy to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, Third Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 12th day of February, 2001.

Heather Johnson
HEATHER JOHNSON

DELIVERED to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this ____ day of January, 2001.

ADDENDUM D

FILED
UTAH SUPREME COURT

MAR 2 1 2001

PAT BARTHOLOMEW
CLERK OF THE COURT

IN THE SUPREME COURT OF THE STATE OF UTAH

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State of Utah,
Plaintiff and Appellant,

v.

Larry Dean Coleman,
Defendant and Appellee.

No. 20000626

ORDER

Defendant's motion to dismiss is denied, and this case is transferred to the court of appeals under Utah R. App. P. 44.

FOR THE COURT:

March 21, 2001
Date

Richard C. Howe,
Chief Justice

CERTIFICATE OF MAILING

I hereby certify that on March 21, 2001, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below:

KRIS C. LEONARD
ASSISTANT ATTORNEY GENERAL
BRENDA J. BEATON
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ATTORNEY GENERAL
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JAMES A. VALDEZ
HEATHER JOHNSON
SALT LAKE LEGAL DEFENDER ASSOCIATION
424 E 500 S STE 300
SALT LAKE CITY UT 84111

and a true and correct copy of the foregoing ORDER was deposited in the United States mail to the trial court listed below:

THIRD DISTRICT, SALT LAKE
ATTN: SUZY CARLSON
450 S STATE ST
PO BOX 1860
SALT LAKE CITY UT 84114-1860

Dated this March 21, 2001.

By _____
Deputy Clerk

Case No 20000626
THIRD DISTRICT, SALT LAKE , 991920662

ADDENDUM E

120 DAY DISPOSITION
CALCULATION COMPARISONS

	Trial Court	State	Mr. Coleman
10/19/99: Information			
18 days			
10/28/99: Notice Executed			
14 days			
11/16/99: Prison "Received"			
30 days			
11/30/99: Prelim. Cont.			
12 days			
12/21/99: Roll call			
23 days			
1/20/00: 1st part of Prelim.			
25 days			
2/1/00: Possible Sched. Date			
7 days			
2/24/00: 2nd part of Prelim.			
9 days			
3/20/00: Arraignment			
3/30/00			
3/27/00: Motion to Dismiss			
5/15/00: Hearing on Motion			
5/23/00: Case Dismissed			
TOTAL DAYS PASSED:	**123**		**138**